IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA-10-0226

PARK PLACE APARTMENTS, L.L.C.,
Plaintiff/Appellant
v.
FARMERS UNION MUTUAL INSURANCE COMPANY AND WILLIAM F. WILHELM
Defendants/Appellees

and
MONTANA FARMERS UNION INSURANCE AGENCY, INC.,
Defendant

and
WHITEFISH INSURANCE AGENCY, INC., A Montana Corporation,
Third Party Defendant

BRIEF OF PLAINTIFF/APPELLANT, PARK PLACE APARTMENTS, L.L.C.

ON APPEAL FROM THE ELEVENTH JUDICIAL DISTRICT COURT FLATHEAD COUNTY, THE HON. STEWART E. STADLER PRESIDING

Terry N. Trieweiler
Attorney at Law
P.O. Box 5509
Whitefish, MT 59937
(406) 862-4597, (406) 862-4685 fax
Attorney for Plaintiff/Appellant, Park Place Apartments, L.L.C.

William J. Gregoire/Steven J. Fitzpatrick
Attorneys at Law
PO Box 2227
Great Falls, MT 59403-2227
(406) 727-4100, (406) 727-9228 Fax
Attorneys for Defendant/Appellee and Third Party Plaintiff William F. Wilhelm

Douglas J. Wold
Attorney at Law
PO Box 400
Polson, MT 59860-0400
(406) 883-3271, (406) 883-3271 Fax
Attorney for Defendant Farmers Union Mutual Insurance Company

James R. Halverson/Katherine S. Huso
Attorneys at Law
PO Box 80470
Billings, MT 59108-0470
(406) 652-1011, (406) 652-8102 Fax
Attorney for Defendant Montana Farmers Union Insurance Agency, Inc.

Guy W. Rogers/Matthew I. Tourtlotte
Attorneys at Law
PO Drawer 849
Billings, MT 59103-0849
(406) 248-2611, (406) 248-3128 Fax
Attorneys for Third-Party Defendant, Whitefish Insurance Agency, Inc.

TABLE OF CONTENTS

PAGE

I. STATEMENT OF THE ISSUES 1

II. STATEMENT OF THE CASE 2

III. STATEMENT OF THE FACTS 8

IV. STANDARD OF REVIEW 20

V. ARGUMENT 22

1. Policy Coverage 22

Summary of Argument 22

2. Agent Liability 28

Summary of Argument 28

CONCLUSION 34

CERTIFICATE OF SERVICE 35

CERTIFICATE OF COMPLIANCE 36

Table of Authorities

Cases **Page(s)**

Accenture LLP v. CSDV-MN Ltd. P'ship,
2007 U.S. Dist. LEXIS 85211 (N.D. Ill. Nov. 19, 2007) 24

Babcock v. Farmers Insurance Exchange,
2000 MT 114, 299 Mont. 407, 999 P.2d 347 21

Bonilla v. University of Montana,
2005 MT 183, 328 Mont. 41, 116 P.3d 823 22

Counterpoint, Inc. v. Essex Ins. Co.,
1998 MT 251, 291 Mont. 189, 967 P.2d 393 23

Cusenbary v. United States Fid. & Guar. Co.,
2001 MT 261, 307 Mont. 238, 37 P.3d 67 21

Dewyngaerdt v. Bean Ins. Agency,
855 A.2d 1267 (N.H. 2004) 31

Eichhorn,
2008 MT 250, 344 Mont. 540, 189 P.3d 615 22

Fillinger v. Northwestern Agency,
283 Mont. 71, 83, 938 P.2d 1347 (1997) 28

Gay v. Levina Standard Bank,
61 Mont. 449, 202 P. 753 (1921) 29, 32

Gwynn v. Cummins,
2006 MT 239, 333 Mont. 522, 144 P.3d 82 21

Hajenga v. Schwein,
2007 MT 80, 336 Mont. 507, 155 P.3d 1241 21

Hickey v. Baker School Dist. No. 12,
2002 MT 322, 313 Mont. 162, 60 P.3d 966 20

Knucklehead Land Co. v. Accutitle, Inc.,
2007 MT 301, 340 Mont. 62, 172 P.3d 116 22

Lee v. Andrews,
204 Mont. 527, 667 P.2d 919 (1983) 29, 32

Leibrand v. National Farmers Union Property & Casualty Co.,
272 Mont. 1, 898 P.2d 1220 (1995) 23, 24

Lorang v. Fortis Ins. Co.,
2008 MT 252, 345 Mont. 12, 192 P.3d 186 20

Mitchell v. State Farm Ins. Co.,
2003 MT 102, 315 Mont. 281, 68 P.3d 703 23

Monroe v. Cogswell Agency,
2010 MT 134, 356 Mont. 417, __ P.3d __ 28, 31, 33

National Gypsum Co.,
182 Mont. at 212, 595 P.2d at 1189 21

Olszewski v. BMC West Corp.,
2004 MT 187, 322 Mont. 192, 94 P3d. 739 22

Peter v. Shumacher,
22 P.3d 481 (Alaska 2001) 30

R.H. Grover, Inc. v. Flynn Ins. Co.,
238 Mont. 278, 777 P.2d 338 (1989) 31

Robertus v. Farmers Union Mut. Ins. Co.,
2008 MT 207, 344 Mont. 157, 189 P.3d 582 ..... 25, 26, 28

Rosenthal v. County of Madison,
2007 MT 277, 339 Mont. 419, 170 P.3d 493 ..... 21, 22

Shelter Mut. Ins. Co. v. Davis,
2008 Iowa App. LEXIS 334 (Iowa Ct. App. May 29, 2008) 30

Smith v. Burlington Northern & Sante Fe Railway Co.,
2008 MT 225, 344 Mont. 278, 187 P3d. 639 22

Swank Enters. v. All Purpose Servs., Ltd.,
2007 MT 57, 336 Mont. 197, 154 P.3d 52 23

Thomas v. Northwestern Nat'l Ins. Co.,
1998 MT 343, 292 Mont. 357, 973 P.2d 804 ..... 26, 27

Trivic, Inc. v. United States Fid. & Guar. Co.,
2007 U.S. Dist. LEXIS 66568, 9-10 (E.D. La. Sept. 6, 2007) 30

Wilderness Socy. v. Bosworth,
118 F. Supp. 2d 1082 (D. Mont. 2000) 21

Rules

Rule 56(c), M.R.Civ.P., ... 20

Statutes

§33-15-1106 MCA 23, 26, 28

§33-17-211 MCA 32

I. STATEMENT OF ISSUES

1. Did the District Court err when it concluded as a matter of law that the carport owned by Park Place Apartments, L.L.C., was not covered by its business owner's policy insured by Farmers Union Mutual Insurance Company because Farmer's agent had not separately listed it in the application and it was, therefore, not separately listed on the declarations page?

2. If the District Court correctly concluded as a matter of law that the carport owned by Park Place Apartments, L.L.C., and located on its business premises was not covered against loss because not separately identified in the application and therefore not separately listed on the declarations sheet, did the District Court err when it also held as a matter of law and that in spite of that conclusion and undisputed evidence to the contrary, that neither was FUMIC'S agent negligent?

3. Did the District Court err when it denied the Plaintiff's cross motions for summary judgment?

II. STATEMENT OF THE CASE

On November 13, 2008, the Plaintiff, Park Place Apartments, L.L.C., filed a complaint in the District Court for the Eighth Judicial District in Cascade County (Cas. Co.) in which Farmers Union Mutual Insurance Company (FUMIC) and William F. Wilhelm were named as defendants. (Cas. Co. Doc 1)

The plaintiff alleged that in May of 2001, it purchased an apartment complex consisting of 24 units and a large carport structure located at 601 Park Avenue, Whitefish, Montana, (Cas. Co. Doc 1, ¶6) and that upon doing so, its principal owner, William Hileman, contacted the defendant William Wilhelm, a local FUMIC insurance agent and requested full coverage for the complex, including replacement cost coverage. (Cas. Co. Doc 1, ¶7)

The complaint alleged that on February 10, 2008, the carport structure collapsed due to the weight of snow and that the plaintiff was first informed by FUMIC's claims agent that the loss was covered, but subsequently informed by FUMIC that it was excluded based on an amendatory endorsement to plaintiff's policy. (Cas. Co. Doc. 1, ¶8)

The plaintiff sought declaratory judgment pursuant to §27-8-202 MCA that the policy did in fact provide coverage (¶¶9-11), alleged breach of contract for failing to cover the replacement cost of the carport (¶¶12-14) and violation of the Unfair Claims Settlement Practices Act found in §33-18-201 MCA (¶¶15-16).

The plaintiff alleged that if, in the alternative, there was no coverage under the policy, then its agent, Wilhelm, was negligent and breached his "duty of reasonable professional care" by failing to obtain the coverage requested. It also alleged that his negligence was attributable to FUMIC. (¶¶20-23)

FUMIC admitted that plaintiff's carport collapsed on February 10, 2008, and that its claims agent, when initially contacted, advised that it was covered by the Plaintiff's policy but denied all other material allegations in the complaint, except for the allegations that Wilhelm was negligent. (FUMIC Answer, Cas. Co. Doc. 8)

Wilhelm admitted that the apartment complex consisted of 24 units with a carport on the premises and that he resided in Whitefish, but denied all other allegations in the complaint. (Wilhelm Answer, Cas. Co. Doc. 22)

On December 4, 2008, in spite of admitting in paragraph 2 of its answer that it is a Montana corporation with its headquarters and principal place of business in Cascade County, FUMIC moved to change venue based, in part, on §25-2-201(3) MCA for the convenience of witnesses. (Mtn. to Change Ven., Cas. Co. Doc. 2, p. 1) In support of that motion, it filed the affidavit of its attorney, Doug Wold, stating that he expected the witnesses to be William Hileman, William Wilhelm, and Rial Gunlikson (FUMIC's adjuster), all of whom reside in Flathead County. (Wold Aff., Cas. Co. Doc. 3, ¶3)

On January 21, 2009, Wilhelm filed a similar motion to change venue for convenience of witnesses. (Mtn. for Change of Ven., Cas. Co. Doc. 19) In support of his motion, he also contended that the three primary witnesses were Hileman, Gunlikson, and Wilhelm, but added a claim that because of Wilhelm's health and his interest in personally attending trial, venue should be changed to his place of residence. (Wilhelm Brf., Cas. Co. Doc. 23, p. 2)

On February 26, 2009, the defendant's motions to change venue were granted over the plaintiff's objections and argument that most relevant evidence, including testimony, would be found in Cascade County.. (2/24/09 Order, Cas. Co. Doc. 33) The court concluded that although Cascade County was a proper county (Doc. 33, p. 3), the convenience of the principal witnesses and Wilhelm's health warranted changing venue to Flathead County. (Cas. Co. Doc. 33, p. 5)

In reality, Wilhelm's attorneys had no intention of calling Wilhelm to appear at trial. On March 19, 2009, notice was served that his deposition would be taken for perpetuation and that his testimony would be presented at trial by videotape. (Flthd. Co. Doc. 6)

When, in compliance with the pre-trial discovery order, FUMIC identified lay witnesses, five out of nine were from Great Falls, including all of those who were relied on for substantive testimony in this case. (FUMIC Witness List, Flthd.

Co. Doc. 62) When FUMIC identified its expert witnesses, both were from Great Falls. (FUMIC's Expert Witness Disclosure, Flthd. Co. Doc. 67)

Likewise, when Wilhelm identified his lay witnesses, five out of nine were from Great Falls (Wilhelm's Lay Witness List, Flthd. Co. Doc. 65), and the only expert witness that he identified was also from Great Falls. (Wilhelm Expert Witness Disclosure, Flthd. Co. Doc. 74)

Once removed to Flathead County, on July 9, 2009, FUMIC moved for summary judgment based on its contention that the policy it issued listed only the apartment building and a laundry room on the declarations page, but not the carport, that an amendatory endorsement issued four years after the policy was issued specifically excluded property for which a limit of coverage was not identified on the declarations page, and that, therefore, there was no coverage as a matter of law. FUMIC's motion was supported by the affidavit of its attorney and Juanita Merriman, one of its employees who lives and works in Great Falls. (FUMIC Mtn. for Partial SJ, Flthd. Co. Doc. 16, pp. 15-18) (Affidavits, Flthd. Co. Doc. 17 and 18)

On July 22, 2009, Wilhelm moved for summary judgment based on two arguments: 1) that he last worked at the insurance agency where the policy was sold on 12/1/05 and was not the agent who issued the renewal policy in effect at the time of plaintiff's loss; and 2) that plaintiff's request for "full coverage" of its

apartment complex was not sufficiently specific to give rise to a duty to obtain coverage for all three buildings or structures located on the apartment complex property. (Wilhelm Brf. In Support of SJ, Flthd. Co. Doc. 21, pp. 4 and 5)

Plaintiff opposed FUMIC's motion for the reason that the plain language of the policy covered all buildings at the apartment house address and that at best the policy was ambiguous based on inconsistent language and filed a cross motion for summary judgment. (Cross Mtn. for SJ, Flthd. Co. Doc. 27 and Brief in Support, Flthd. Co. Doc. 28)

On August 21, 2009, the plaintiff filed a cross motion for summary judgment against Wilhelm and brief in support. (Flthd. Co. Doc. 36 and 37) In support of its motion, it attached the affidavit of William Hileman, the principal owner of Park Place Apartments, L.L.C., and filed separately an affidavit from Jim Conkle, a law school graduate and insurance agent from Missoula, who, after reviewing the various depositions and affidavits, expressed the opinion that if the policy obtained by Wilhelm for the plaintiff did not cover all the structures on the apartment complex property, then Wilhelm was negligent for failing to obtain a policy that did so. (Conkle Aff., Flthd. Co. Doc. 38, ¶4) Wilhelm offered no affidavit nor opinion or evidence to the contrary in support of his own motion or in opposition to the plaintiff's cross motion. Briefing of the motions was completed on 9/28/09. (Doc. 46) Argument was heard on 12/10/09. (Doc. 79)

On April 8, 2010, the district court entered its order granting FUMIC's and Wilhelm's motions for summary judgment and denying plaintiff's cross motions. (Flthd. Co. Doc. 110, p. 1) It held that the language of the policy was clear and unambiguous and provided for coverage of property described in the declarations which did not include the carport. (Flthd. Co. Doc. 110, p. 3)

It held that Wilhelm's only duty was to provide the coverage he agreed to provide in response to a specific request, that the plaintiff's request was not sufficiently specific to give rise to a duty, and that Wilhelm had made no promise to procure insurance for the carport. (Flthd. Co. Doc. 110, p. 4) Judgment was entered for Wilhelm on April 14, 2010, and for FUMIC on April 19, 2010. On June 24, 2010, the district court entered its order certifying the judgments as final pursuant to Rule 54(b) M.R.Civ.P.

III. STATEMENT OF FACTS

The following facts are taken from the affidavits of William E. Hileman, Jr., dated July 31, 2009 and August 20, 2009, which are attached as Appendix 2 and 3 respectively, the affidavit of Jim Conkle, attached as App. 4, and the deposition testimony of Juanita Merriman, Thomas Barker, William Wilhelm, and William Hileman, Jr., which are attached as App. 5, 6, 7, and 8, respectively.

The Plaintiff, Park Place Apartments, L.L.C., purchased apartments located at 601 Park Avenue in Whitefish, Montana on May 1, 2001. (7/31/09 Aff., ¶1) The apartment complex included the main building, a carport to the rear and a laundry building. Their respective locations are illustrated on Exh. 2 to the 7/31/09 Hileman Affidavit. (App. 13)

Prior to purchasing the apartment building, William Hileman, the Plaintiff's principal owner, visited William Wilhelm, a defendant, whom he knew from prior business experience to be an agent for FUMIC. He told him that he was buying the Park Place Apartments and wanted insurance coverage for the property to include property casualty insurance as well as liability insurance. Wilhelm told him he would first have to visit the property and then did so. (7/31/09 Aff., ¶3)

According to FUMIC's underwriting department, it was customary for the agent who sells the policy to take pictures of the business property (Merriman Depo., p. 51, ls. 15-17) so that underwriting can see what buildings are on the

property and the condition of the buildings. (Merriman Depo., p. 52, ls. 2-8) FUMIC's underwriter agreed that Wilhelm had done so and that she kept photographs of Park Place Apartments in FUMIC's file. (Merriman Depo., p. 51, l. 22 – p. 52, l. 1)

Attached as Exhibit No. 3 to the first Hileman Affidavit are photographs of the property as it appeared on May 1, 2001. The carport is depicted in the photograph on the lower left corner. (7/31/09 Aff., ¶4) (App. 14)

Prior to his purchase of the apartment complex, Hileman had its value appraised. A copy of the appraisal is attached hereto as App. 15. The final market value estimate was $750,000.00 which included an estimated construction cost for the carport at that time in the amount of $46,200.00. He therefore asked for replacement cost coverage in the amount of $750,000.00. (7/31/09 Aff., ¶5)

After Wilhelm visited the property and filled out an application form, he brought it to Hileman's office for his signature. Hileman noticed that the form specifically listed the apartment building as building no. 1 (insured for $750,000) and the laundry building as building no. 2. He asked why those two buildings were listed. Wilhelm said that it would not have been necessary to list building no. 2 because all buildings and structures on the property were covered but that FUMIC liked to see those buildings to which people were coming and going specifically identified. On that basis, Hileman assumed that the carport structure was included

in coverage even though not specifically listed on the application form. He did not believe it was necessary to list it separately because he did not considerate it a building. (7/31/09 Aff., ¶6)

The application was signed on behalf of the Plaintiff on May 1, 2001. Coverage was bound effectively on that date. (7/31/09 Aff., ¶7)

As Hileman made clear in his deposition testimony (Hileman Depo., 21:15-22:4), he asked for casualty and liability coverage on the property he was purchasing. As his affidavit makes clear, he did not ask that any of the property at the insured location be excluded from coverage. (8/20/09 Aff., ¶3)

At no time subsequent to his purchase of insurance from Wilhelm, did Bill Hileman change any terms of the policy. He assumed, based on his initial conversation with Wilhelm, that all the property at the location of Park Place Apartments was covered and, therefore, that no changes were necessary. Based on that assumption, there was no reason for him to have subsequent conversations with Wilhelm's successor, Monte Sparby, about the extent of coverage and until the collapse of the carport on February 10, 2008, he had no reason to think that there was not casualty and liability coverage for all of the property at that location. (8/20/09 Aff., ¶4) None of these facts are contradicted.

Attached hereto as App. 9 is a copy of Park Place Apartments' business owner's policy purchased from FUMIC which was in effect on February 10, 2008.

On page 1 under Section I, it describes covered property. In paragraph IA1, it states that "covered property includes Buildings as described under Paragraph a. below..." Paragraph a. included "buildings and structures at the premises described in the declarations,..." (7/31/09 Aff., ¶8)

Attached as App. 10 is a copy of the new business declaration sheet Park Place Apartments received for the coverage that it purchased from FUMIC. On page 3, insured "premises" are described as "per location address shown on the declaration". The only address shown on the first page of the declaration for the apartment complex that was insured is 601 Park Avenue, Whitefish, Montana, 59937. (7/31/09 Aff., ¶9)

Attached as App. 11 is a copy of the declaration sheet for the period from May 1, 2007, to May 1, 2008. The premises are described identically on the third page. The address is the same on the first page. (7/31/09 Aff., ¶10)

On February 10, 2008, the roof on the carport structure located at 601 Park Avenue collapsed due to the weight of snow and the carport was destroyed. (7/31/09 Aff., ¶11)

As shown previously, the premises were described on p. 3 as the address listed for the property on the declarations page. The address listed on the declarations page was 601 Park Avenue. The carport which collapsed on February 10, 2008, was located on the premises at 601 Park Avenue. (7/31/09 Aff., ¶12)

Based on his intention as expressed to Wilhelm regarding coverage, Wilhelm's explanation to him of the coverage that would be provided and the language in the policy, it was Bill Hileman's understanding that all the buildings and structures on the premises located at 601 Park Avenue were insured against loss by FUMIC. (7/31/09 Aff., ¶13)

Following the loss on February 10, 2008, after first being advised by FUMIC's adjuster, Rial Gunlikson, that the loss was covered and later being told that based on changes to the policy, it was not covered, Mr. Hileman wrote to him on April 4, 2008, and demanded payment for the value of the carport. He requested a prompt and reasonable explanation of the exact basis relied upon if the claim was denied. (7/31/09 Aff., ¶14)

In response, he received the letter attached hereto as App. 12, dated April 8, 2008, and signed by Thomas E. Barker, Assistant Vice President of FUMIC's Claims Department. The specific reason that he gave for denial of the claim was that the carport was not listed separately on the declarations page and that endorsement BOP-54 which would have been added to the policy in 2005 "modified" the original coverage by excluding "buildings for which no limit of insurance is shown in the declarations." No other reason was given for denying coverage for loss of the carport. (7/31/09 Aff., ¶15)

Bill Hileman has retained copies of all documents received from FUMIC since the Plaintiff's purchase of business owner's coverage for Park Place Apartments, L.L.C. in 2001. His records include all of the declarations pages including those for the renewal in 2005 when the change allegedly occurred and for 2007-2008 when its loss occurred. His records do not include any copy of an endorsement which would indicate that coverage had been reduced to exclude coverage for the carport because it was not individually identified on the declarations page. The 2005 declarations page does list BOP-54 in a long list of forms and endorsements but offers no explanation of its effect. It is simply identified as "amendatory endorsement". (7/31/09 Aff., ¶16)

Park Place Apartments has never received notice in any form from FUMIC that its coverage was being reduced to exclude replacement cost of the carport that it owned. (7/31/09 Aff., ¶18)

Following denial of the claim, Bill Hileman visited Monte Sparby who replaced Bud Wilhelm as the agent for FUMIC in Whitefish in 2005. He asked if he could see the file for Park Place Apartments, L.L.C. kept at the agency. He reviewed the file. A copy of the complete file was attached as Exhibit No. 14 to the deposition of Wilhelm who recognized it as typical of what would have been included in the files that he kept for the insureds to whom he sold insurance. (Wilhelm Depo., p. 43, ls. 5-15) The file does not include a copy of amendatory

endorsement BOP-54 nor any other notice that insurance coverage for Park Place Apartments, L.L.C. was being reduced in 2005 to exclude replacement cost coverage for the carport. (7/31/09 Aff., ¶19)

Since the complaint was filed, Farmers has taken the additional but inconsistent position that there was no coverage initially provided by the terms of the policy because the carport was not separately listed. (See Complaint, ¶7, Answer, ¶7 and FUMIC's Brief in Support of Motion for Summary Judgment) In other words, the endorsement eliminated coverage that never existed. The district court apparently agreed.

Conkle Opinion

Jim Conkle has a business degree from Ohio State University, a law degree from the University of Montana, and has been a licensed agent for the sale of insurance in Montana since July 19, 2002. (Conkle Aff., ¶¶1 and 2) Among the products he sells are property and casualty insurance. He is an agent for Farmers Insurance Group. (Conkle Aff., pp. 2 and 3) He has reviewed the affidavit of William Hileman, Jr. and the deposition of the Defendant, William F. Wilhelm and on the basis of the information disclosed expressed the opinions that:

1. William Wilhelm had a duty on May 1, 2001, to assure that coverage was provided for all the structures, buildings and personal property located at the Park Place Apartments address and, if he failed to do so, his conduct fell below the

standard of care applicable to insurance agents in the State of Montana. (Conkle Aff., ¶4a)

2) If during the time that Park Place Apartments, L.L.C.'s casualty and liability insurance with FUMIC was in effect, property at that address was excluded but the insured was not notified, the agent during whose employment property was excluded had a duty to notify his insured of the change in coverage and failure to do so would have fallen below the standard of care applicable to licensed insurance agents in the State of Montana. (Conkle Aff., ¶4b)

3) It is also Mr. Conkle's opinion based on his experience that if coverage did not exist in the policy provided originally on May 1, 2001, by William Wilhelm, and no changes were made by the insured, there would be no way during the normal course of events for the insured to know that it lacked coverage and that any denial of coverage at a later date would be a direct result of the coverage originally provided. (Conkle Aff., ¶4c)

Testimony of William Wilhelm

William Wilhelm sold property, casualty and life insurance for FUMIC until December 31, 2005. (Wilhelm Depo., p. 6, l. 23 – p. 8, l. 19) His understanding of his relationship was that he worked for the Wilhelm agency which worked for FUMIC. (p. 12, ls. 15-25) He had to have FUMIC's approval before selling anyone else's product. (p. 12, ls. 8-10) He believes the company paid for his

advertising. (p. 15, ls. 14-17) He believes he identified Farmers as the product he sold in his yellow page ad. (p. 15, l. 22 – p. 16, l. 2) And, he believes he had an FUMIC sign on his office building. (p. 16, ls. 3-6) Farmers trained him (p. 16, ls. 24-25) and he was paid monthly based on a percentage of the premiums that he sold. (p. 13, l. 24 – p. 14, l. 8) He was not allowed to advertise without FUMIC's approval and he was prohibited from selling insurance for any other insurer without FUMIC's consent. (p. 21, ls. 1-18)

Farmers provided him with a manual for the sale of business owners' coverage which established guidelines for the sale of its policies. (p. 23, ls. 4-13) On page 3 under the heading "Mandatory Coverages", it required coverage of all business building and personal property located on each business premises. (p. 23, l. 18 – p. 24, l. 6) He understood that to mean that if you sold a business policy you were required to cover all of the buildings on the property. (p. 24, ls. 7-14)

In fact, his duties included visiting the premises that were to be insured, and photographing the property. (p. 24, l. 22 – p. 26, l. 5) As explained previously by Ms. Merriman, that was so that FUMIC would be aware of the actual buildings and structures located on the property.

He was aware that the carport was part of the apartment complex. He has been driving by the location since 1987. (p. 34, l. 2 – p. 35, l. 12) He does not know why he did not specifically list it on the application form (p. 29, ls. 10-14)

but agreed that it would not have sounded reasonable to him that the applicant for insurance would have wanted to exclude coverage for any part of the property. (p. 35, ls. 20-23) It was his assumption when he sold the policy that it covered all the property at that location. At least, that was his intention. (p. 36, ls. 1-5)

If the underwriters decided not to cover some part of the property, they would have let him know and he would have let the insured know. (p. 36, ls. 11-16) He agreed that that would have been one of his responsibilities. (p. 36, ls. 17-19)

Wilhelm did not have any idea why he would have sold a business owners' policy covering two buildings but not a third structure on the same property. (p. 38, ls. 8-10) He does not think he would have done so intentionally. (p. 38, ls. 11-14)

Mr. Wilhelm kept a file for the people he sold insurance to which included everything he received from Farmers that pertained to that insured. It would include changes to the policies. (p. 41, ls. 7-19)

He expected to get notice of any changes made to his clients' policies. (p. 42, ls. 2-4) And, if he received notice and it was significant, he would communicate it to his insured. (p. 42, ls. 5-8)

Exhibit No. 14 to Wilhelm's deposition was the file for Park Place Apartments, L.L.C. kept by his successor, Monte Sparby. He recognized it as typical of what would have been in his file. (p. 43, ls. 5-15)

Mr. Wilhelm testified that if the covered property in the policy is defined as buildings and structures on the premises described in the declarations, the declarations described the premises as the address shown on the declaration, and, if the address is 601 Park Avenue and that is where the carport that collapsed was located, he would assume as the agent that the carport was a covered structure. (p. 45, ls. 6-20) and (p. 45, l. 21 – p. 46, l. 11)

Merriman Testimony

Juanita Merriman is a commercial underwriter for FUMIC (Merriman Depo., p. 4, l. 18 – p. 5, l. 2) and testified that forms they use in their business are provided by the Insurance Service Office sometimes referred to as ISO. (p. 53, ls. 10-15) ISO establishes the standard for forms in the insurance industry. (p. 53, ls. 17-19) App. 16 was page 324 of documents produced by FUMIC at the deposition of Thomas Barker, its Vice President in charge of claims (who resides in Great Falls). It is a page from an ISO manual explaining revisions to its insurance forms. It states in relevant part as follows:

> "The building property category includes not only the building(s) identified in the policy declarations, but a number of other types of property as well.

> **Building or structure.** First, the building property category applies to 'the building or structure described in the declarations.' Although the words 'building' and 'structure' are not defined in the coverage form, a 'structure may be thought of as property erected on and attached to land that is not walled and roofed' and a 'building' is generally thought of as a walled, roofed structure.
>
> Industry practices on 'describing' the covered buildings and structures on the declarations page vary, depending on the insurer issuing the policy, the limit structure, and the account size. **One common method of 'describing' the covered buildings and structures is simply to provide the street address of the property. This approach is particularly common for policies insuring larger organizations with multiple locations.**
>
> ...
>
> **...For example, if the description is simply a street address, and there is more than one building at that address, the covered building property provision would automatically extend coverage to apply to all buildings at that address. As a practical matter, the insurer normally is well aware of the existence and nature of all of the insured's buildings at the street address(es) shown in the declarations."** (highlighting added)

The ISO explanation also points out that another manner of describing insured buildings and structures is to specifically list them. In this case, FUMIC specifically described "premises" on the third page of its declarations sheet as the address shown on the declaration. It also listed on page 1 two buildings located at that address. However, that did not negate the specific language which insured

buildings at the "premises" and described the "premises" as the address insured. And, contrary to the arguments of FUMIC, as accepted by the district court, the manner in which the carport was covered was typical in the insurance industry.

Ms. Merriman agreed that if the carport had been covered by the terms of the original policy and coverage was eliminated that would constitute a reduction in coverage. (p. 48, l. 24 – p. 49, l. 3)

IV. STANDARD OF REVIEW

Pursuant to Rule 56(c), M.R.Civ.P., the party moving for summary judgment must demonstrate that no genuine issues of material fact exist. *Hickey v. Baker School Dist. No. 12*, 2002 MT 322, ¶ 12, 313 Mont. 162, 60 P.3d 966. Once this has been accomplished, the burden then shifts to the non-moving party to prove by more than mere denial and speculation that a genuine issue does exist. *Hickey*, ¶ 12. Having determined that no genuine issues of fact exist, a court must then determine whether the moving party is entitled to judgment as a matter of law. *Hickey*, ¶ 12. In the insurance context, summary judgment is the proper remedy "where there are no genuine disputes as to the facts which are material to a claim." *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 103, 345 Mont. 12, 192 P.3d 186. When both sides concede that the issue before the court is one of law, the court must simply apply the law to the undisputed facts in determining which party is entitled to summary judgment. *Lorang*, ¶¶ 102-03.

The interpretation of an insurance contract is a question of law. *Cusenbary v. United States Fid. & Guar. Co.*, 2001 MT 261, ¶ 9, 307 Mont. 238, 37 P.3d 67; *Babcock v. Farmers Insurance Exchange*, 2000 MT 114, ¶ 5, 299 Mont. 407, 999 P.2d 347. Issues of law are capable of resolution through summary judgment. *Wilderness Socy. v. Bosworth*, 118 F. Supp. 2d 1082, 1089 (D. Mont. 2000).

"The primary policy and general purpose underlying summary judgment is to encourage judicial economy through the prompt elimination of questions not deserving resolution by trial." *Gwynn v. Cummins*, 2006 MT 239, ¶ 12, 333 Mont. 522, 144 P.3d 82 (citing *Olson v. Osmolak*, 2003 MT 151, ¶ 13, 316 Mont. 216, 70 P.3d 1242); *Hajenga v. Schwein*, 2007 MT 80, ¶ 11, 336 Mont. 507, 155 P.3d 1241 (purpose of summary judgment is to dispose of those actions which do not raise genuine issues of material fact and to eliminate the burden and expense of unnecessary trials); *see also Rosenthal v. County of Madison*, 2007 MT 277, ¶ 22, 339 Mont. 419, 170 P.3d 493.

A party opposing a motion for summary judgment may not rest upon the mere allegations or denials of his pleadings. *National Gypsum Co.*, 182 Mont. at 212, 595 P.2d at 1189. Nor may he rely on the unsupported arguments of counsel. *Hajenga*, ¶ 13 (citing *Montana Metal Buildings, Inc. v. Shapiro*, 283 Mont. 471, 476, 942 P.2d 694, 697 (1997)). Similarly, bald assertions, speculative statements, conclusory declarations, and fanciful, frivolous, or conjectural facts are insufficient

to defeat a motion for summary judgment. *Eichhorn*, 2008 MT 250, ¶¶ 19-20, 344 Mont. 540, 189 P.3d 615; *Bonilla v. University of Montana,* 2005 MT 183, ¶ 20, 328 Mont. 41, 116 P.3d 823; *Rosenthal v. County of Madison*, 2007 MT 277, ¶ 22; *Knucklehead Land Co. v. Accutitle, Inc.*, 2007 MT 301, ¶ 26, 340 Mont. 62, 172 P.3d 116 ("[s]ummary judgment cannot be defeated by unsupported speculation").

This court reviews a district court's grant or denial of a motion for summary judgment de novo and applies the same Rule 56, M.R.Civ.P., criteria as applied by the district court. *Smith v. Burlington Northern & Sante Fe Railway Co.*, 2008 MT 225, ¶10, 344 Mont. 278, 187 P3d. 639; *Olszewski v. BMC West Corp.*, 2004 MT 187, ¶9, 322 Mont. 192, 94 P3d. 739.

V. ARGUMENT

1. POLICY COVERAGE

Summary of Argument

The plain language of the policy purchased by Park Place Apartments from FUMIC provides coverage for the carport which was a building or structure located at the premises defined in the policy as the insured address. At most, FUMIC included potentially inconsistent provisions in its policy which must be construed in favor of coverage.

Because FUMIC's amendatory endorsement BOP-54 would have effectively reduced coverage from that which was originally purchased, the

terms of the renewed policy were less favorable and notice to that effect was required pursuant to §33-15-1106 MCA. Since notice was not received, the proposed change was ineffective.

Discussion

When a court reviews an insurance policy, it is bound to interpret its terms according to their usual, common sense meaning as viewed from the perspective of a reasonable consumer of insurance products. *Counterpoint, Inc. v. Essex Ins. Co.*, 1998 MT 251, ¶ 13, 291 Mont. 189, 967 P.2d 393. However, exclusions from coverage are to be narrowly and strictly construed because they are contrary to the fundamental protective purpose of an insurance policy. *Swank Enters. v. All Purpose Servs., Ltd.*, 2007 MT 57, ¶ 27, 336 Mont. 197, 154 P.3d 52. Similarly, when an insurance policy is ambiguous, it is to be interpreted most strongly in favor of the insured and any doubts as to coverage are to be resolved in favor of extending coverage for the insured. *Mitchell v. State Farm Ins. Co.*, 2003 MT 102, ¶ 26, 315 Mont. 281, 68 P.3d 703 (citation omitted). "An insurance policy clause is ambiguous when different persons looking at the clause in light of its purpose cannot agree upon its meaning." *Leibrand v. National Farmers Union Property & Casualty Co.*, 272 Mont. 1, 8, 898 P.2d 1220, 1223 (1995). In *Leibrand*, inconsistent coverage provisions led to a finding of ambiguity and, therefore, a determination that certain amendatory endorsements were unenforceable.

Leibrand, 272 Mont. at 17-18, 98 P.2d at 1225-26.

In *Accenture LLP v. CSDV-MN Ltd. P'ship*, 2007 U.S. Dist. LEXIS 85211 (N.D. Ill. Nov. 19, 2007), the court found a commercial lease to be ambiguous as a matter of law with regard to its use of the term "building," as that term could include or exclude an associated parking garage.

In the policy purchased by Park Place, the plain language covered "buildings and structures at the premises described in the declarations, . . ." Page 3 of the declarations describes insured "premises" as "per location address shown on the declaration." The only address shown on the declaration is 601 Park Avenue, Whitefish, Montana, 59937. The carport at issue was located on the business premises at that address. Therefore, based on the plain language of the policy, the carport was covered. Bill Hileman thought so. William Wilhelm thought so, and according to the Insurance Service Office from which FUMIC obtains forms, that was a perfectly acceptable manner of covering buildings on business property.

FUMIC argued, and the district court agreed, that by adding two specific buildings on the first page of the declarations, the third building was omitted from coverage by inference. However, taking FUMIC's argument at face value, specifically listing two buildings simply created a conflict in the terms of the policy – a conflict created by the insurer which drafted the policy, and which, therefore, must be construed against the insurer. Either way, Park Place

Apartments was entitled to summary judgment on the issue of whether by its original terms, the policy it purchased provided coverage for the carport which was destroyed on February 10, 2008.

Amendatory Endorsement

FUMIC's fallback position, or as described by its vice president, the "icing on the cake" (Barker Depo., p. 22, ls. 16-23) is the amendatory endorsement that it added to the policy in 2005. (The inconsistency of eliminating coverage that never existed notwithstanding.) However, Bill Hileman, owner of Park Place Apartments, received no notice of the amendment.

In *Robertus v. Farmers Union Mut. Ins. Co.*, 2008 MT 207, ¶26, 344 Mont. 157, 189 P.3d 582, Farmers Union, in an attempt to avoid stacking coverage, changed the Robertuses' policy upon renewal by modifying the policy's UM/UIM coverage to charge the Robertuses a single premium for all seven of their vehicles. Farmers Union did not send a separate notice of the change to the Robertuses and the policy's declarations page (and a modified premium) provided the only indication that Farmers Union had changed their UM/UIM coverage. The declarations page previously had listed each vehicle along with the amount of UM/UIM coverage for that vehicle. Farmers Union simply replaced the column showing the separate UM/UIM premium charged for each vehicle with the word "included" and listed a total UM/UIM premium amount separately at the bottom of

the list.

Under these circumstances, the Court voided the policy modification, holding that such a change constituted less favorable terms and thus required notice pursuant to §33-15-1106, MCA,[1] and that Farmer's Union's notice was inadequate. *Robertus*, ¶ 26 (whether an insurer has provided adequate notice of a change in insurance coverage requires a two-step analysis: a court must determine whether the policy modification constituted a change in coverage requiring notice under §33-15-1106, MCA; then, a court must determine whether the insurer provided adequate notice of the change in coverage).

The Court in *Robertus* relied, in part, on its previous decision, *Thomas v. Northwestern Nat'l Ins. Co.*, 1998 MT 343, 292 Mont. 357, 973 P.2d 804. In *Thomas*, the insureds filed suit against their insurer alleging that it wrongfully refused to defend and indemnify them under a commercial general liability insurance policy. At issue was a change to a policy exclusion regarding pollution coverage that the insurer made at renewal. The Court held that when an insurer renews a previously issued policy, it has an affirmative duty to provide adequate notice to the insured of changes in coverage. *Thomas*, ¶19. The Court reasoned that parties must necessarily agree on the terms of renewal coverage and that an

1. § 33-15-1106, MCA, Renewal with altered terms.
(1) If an insurer offers or purports to renew a policy but on less favorable terms, at a higher rate, or at a higher rating plan, the new terms, rate, or rating plan take effect on the policy renewal date only if the insurer has mailed or delivered notice of the new terms, rate, or rating plan to the insured at least 45 days before the expiration date.
(2) This section does not apply if the increase in the rate or the rating plan, or both, results from a classification change based on the altered nature or extent of the risk insured against.

insured has a reasonable expectation that his insurance policy will not be renewed on less favorable terms unless the insurer affirmatively notifies him of the changes. *Thomas*, ¶¶19-25.

The court also held that it is the insurer's burden to prove it provided adequate notice of policy changes. The court stated that "where the policy at issue is a renewal policy, the insured's duty to read it may be less than the insured's duty to read the original policy." *Thomas*, ¶ 28 ("a fair comparison of the policies in 1989 and 1990 would reveal no significant changes in either the declaration page or the second page which scheduled the forms and exclusions. One would have to read through the entire policy before reaching the endorsement section where the total pollution exclusion was placed. Even then, the insured would have to compare the total pollution exclusion with the pollution exclusion contained in the original policy to determine if there was any difference").

In this case, FUMIC agrees that if the carport had been originally covered and then excluded, coverage was reduced. (See Merriman Depo., p. 48, l. 24 – p. 49, l. 3 and Barker Depo., p. 34, ls. 17-13) In fact, when asked to provide the specific explanation for why coverage was being denied, the only explanation offered by Mr. Barker was amendatory endorsement BOP-54, listed on the Plaintiff's declarations page for the first time in 2005 but never explained. (Barker Depo., p. 22, l. 1 – p. 24, l. 3) Certainly, the notice of a substantial change in the

Plaintiff's coverage which is required by § 33-15-1106, MCA and the Supreme Court's decision in *Robertus* was not provided. Listing an unexplained "amendatory endorsement" with no explanation that a substantial structure on the Plaintiff's property was being excluded was no better than the subtle change listed on the declarations page in *Robertus*. It is inadequate notice for the same reason.

2. AGENT LIABILITY

Summary of Argument

If the policy issued by FUMIC to Park Place Apartments, L.L.C., did not provide casualty and liability coverage for all of the buildings on the premises of the apartment complex simply because they were not individually listed in the application for insurance, then based on existing Montana authority, William Wilhelm breached his duty to the plaintiff and was negligent as a matter of law. His negligence is imputed to FUMIC.

Discussion

In its recent decision in *Monroe v. Cogswell Agency,* 2010 MT 134, ¶31, 356 Mont. 417, __ P.3d __, this court left undecided the full extent of an insurance agent's duty to reasonably protect the people who rely on him or her for insurance coverage. However, in the event this court concludes that Park Place Apartments did not have the coverage it thought it had at the time of its loss, its agent breached the minimum duty that has been discussed in this court's prior cases. See *Fillinger*

v. Northwestern Agency, 283 Mont. 71, 83, 938 P.2d 1347, 1355 (1997) and *Lee v. Andrews*, 204 Mont. 527, 533, 667 P.2d 919, 921 (1983). There the court reiterated the legal standard of care for insurance procurement which was first announced in *Gay v. Levina Standard Bank*, 61 Mont. 449, 202 P. 753, 755 (1921), when the Court stated:

> "[A]s between the insured and his own agent or broker authorized by him to procure insurance, there is the usual obligation on the part of the latter to carry out the instructions given him and faithfully discharge the trust reposed in him, and he may become liable in damages for breach of duty. If he is instructed to procure specific insurance and fails to do so, he is liable to his principal for the damage suffered by reason of the want of such insurance. The liability of the agent with respect to the loss is that which would have fallen upon the company had the insurance been effected as contemplated."

In *Fillinger*, the Court upheld a jury verdict finding an agent liable for negligent misrepresentation and failing to procure specific insurance coverage when the agent failed to procure the coverage requested by the plaintiff, an outdoor outfitter. Fillinger testified at trial that he requested the agent to "procure a policy which would cover everything, especially if anyone was hurt on a horse." *Fillinger*, 283 Mont. at 79938 P.2d at 1353.

Fillinger's request was not unlike Hileman's request in this case that Wilhelm procure "insurance coverage for the property" without any suggestion that any part of the property should be excluded. Based on his conversation with

Wilhelm, it was Hileman's understanding that everything on the property would be covered. (Hileman Depo., p. 23, ls. 16-23)

Other courts agree. See *Trivic, Inc. v. United States Fid. & Guar. Co.*, 2007 U.S. Dist. LEXIS 66568, 9-10 (E.D. La. Sept. 6, 2007) ("[w]hen an agent has reason to know the risks against which an insured wants protection and is experienced with the types of coverage available in a particular market, 'we must construe an undertaking to procure insurance as an agreement by the agent to provide coverage for the client's specific concerns'); *Peter v. Shumacher,* 22 P.3d 481, 487 (Alaska 2001) ("Agent may be liable to the insured if the agent fails to respond appropriately to a request or inquiry for or about a particular type or extent of coverage" and "may have a duty to clarify an ambiguous request before providing coverage"); *Shelter Mut. Ins. Co. v. Davis*, 2008 Iowa App. LEXIS 334 (Iowa Ct. App. May 29, 2008) (court voided a policy's off-premises exclusion and held coverage existed for an ATV accident under the reasonable expectations doctrine since the exclusion eliminated the dominant purpose of the insureds' request for "full coverage" for their ATVs).

Authorities relied on by the district court are either not in point or have been too narrowly construed. This is not a case where the argument is about the extent or nature of coverage provided. This is a case where coverage was requested for Park Place Apartment property and according to FUMIC, no coverage at all was

provided for part of it because of the manner in which the application for insurance was completed by its agent, William Wilhelm. [2]

R.H. Grover, Inc. v. Flynn Ins. Co., 238 Mont. 278, 284, 777 P.2d 338, 341 (1989) cited on p. 4 of the district court's order had nothing to do with a broad request for insurance. In that case, no request for any insurance was made. In that case, an employee for the defendant erroneously issued a certificate of professional liability insurance to a contractor naming Grover, a subcontractor as their certificate holder. *R.H. Grover, Inc.*, 238 Mont. at 282, 777 P.2d at 340. The contractor "did not have professional liability insurance and never had any such coverage or policy." *R.H. Grover, Inc.*, 238 Mont. at 282.

While *Dewyngaerdt v. Bean Ins. Agency*, 855 A.2d 1267 (N.H. 2004) (cited on p. 4 of the district court's order) does stand for the proposition that a broad, general request for full coverage does not impose a duty on an insurance agent "to know all an insured's needs, to procure suitable coverage, and to inform an insured of every facet of the coverage," *Dewyngaerdt*, 855 A.2d at 1271, the issue in this case does not involve the details of coverage. It involves the allegation by FUMIC that no coverage was, in fact, provided. Furthermore, that court held that "the factual circumstances surrounding the request for coverage are relevant."coverage" for his business property and rely on his agent to at least cover all of the buildings

2. At that point, he clearly was FUMIC's agent. See *Monroe v. Cogswell Agency*, 2010 MT 134, ¶39, 356 Mont. 417, __P3.d__.

coverage" for his business property and rely on his agent to at least cover all of the buildings obviously located on the property would leave the average applicant for insurance with no benefit at all from having gone to an insurance agent. It would mean there are no standards of conduct for insurance agents in spite of the fact that the state of Montana requires that they demonstrate minimal qualification to be licensed. §33-17-211 MCA. As reliant as the economy in Montana is on insurance coverage, that can't be an acceptable option as a matter of public policy.

Nor do either *Lee* or *Gay*, cited on p. 4 of the district court's opinion, permit the narrow interpretation applied by the district court. The requirement of those cases that a specific type of insurance be requested and agreed upon was satisfied when Bill Hileman asked for casualty and liability insurance on the property that he was purchasing. The carport was part of the property that he was purchasing. And the appraisal that he submitted to Wilhelm in support of the amount of coverage that he sought included an amount for the carport. What consumer could reasonably be expected to be more specific than that? If that isn't sufficient, no agent would have any duty and they would, in effect, be providing no service at all.

In this case, the dispute is not whether Bill Hileman accurately described the specific terms to be included in the policy. It has been clearly established that he requested that the defendant, Wilhelm, procure casualty and liability insurance for his property and according to FUMIC, he did not do so. In that event, based on

Montana law, the affidavit testimony of Jim Conkle, Wilhelm's own admissions, the guidelines imposed by FUMIC on its agents, and all the authorities cited, Wilhelm is liable for negligence because of his failure to do so, and FUMIC is liable for the negligence of its agent.

The plaintiff concurs with the position taken by the Montana Trial Lawyers in its amicus brief filed in *Monroe v. Cogswell Agency,* 2010 MT 134, ¶31, 356 Mont. 417, __ P.3d __. That position is that because of state licensing requirements, continuing education requirements, the public's reliance on the advice and service provided by insurance agents and the public policy which requires protection of insurance consumers, agents should be held to a standard of care established by the customs and expectations of their own profession. In other words, they'd be bound by the same duty that applies to every other profession in Montana. This case is a perfect example of how, when misapplied, the current standard can lead to absurd results.

Based on the professional standard of care and the uncontroverted evidence, plaintiff also proved that William Wilhelm was negligent in the event that insurance coverage for the carport was not provided or was excluded by amendment and Park Place was never notified. Based on either standard, it was entitled to summary judgment against the defendant William Wilhelm, and, therefore, against FUMIC.

CONCLUSION

Park Place Apartments purchased an insurance policy from FUMIC, the plain terms of which provided coverage for all buildings located on the "premises" described in the declarations page. Page 3 of the declarations page described "premises" as "per location address shown on the declaration". The building at issue was part of the business property insured and located at the only address listed on the declaration page. If coverage was confused by FUMIC's inclusion of two specific buildings on the declaration page but omission of another, the confusion or ambiguity was created by FUMIC and coverage must be found based on the confusion that it created.

In the event that this court concludes that the policy did not provide coverage, then the plaintiff did not receive the insurance that was specifically requested from its agent and, for that reason, based on Montana's prior authorities and the uncontroverted evidence in this case, plaintiff was entitled to summary judgment against William Wilhelm, and his principle FUMIC.

For these reasons, the district court's order granting summary judgment to FUMIC and Wilhelm should be reversed. Its order which denied summary judgment against FUMIC or in the alternative against Wilhelm should be reversed and judgment in favor of the plaintiff entered on the issue of liability.

DATED this 12 of July, 2010.

TRIEWEILER LAW FIRM

Terry N. Trieweiler

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of July, 2010, a true and exact copy of the foregoing document was served on the Appellees by mailing a copy, postage pre-paid to:

William J. Gregoire
Steven J. Fitzpatrick
Attorney at Law
PO Box 2227
Great Falls, MT 59403-2227

Douglas J. Wold
Attorney at Law
PO Box 400
Polson, MT 59860-0400

James R. Halverson/Katherine S. Huso
Attorneys at Law
PO Box 80470
Billings, MT 59108-0470

Guy W. Rogers/Matthew I. Tourtlotte
Attorneys at Law
PO Drawer 849
Billings, MT 59103-0849

Dated this 12th day of July, 2010.

Karen R. Weaver

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the Appellant's Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Office Word 2003, is 8,062 words, including all text, excluding table of contents, table of citations, certificate of service and certificate of compliance.

Dated this 12th day of July, 2010.

Karen R. Weaver